IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC: LABOUR REVISION NO.81 OF 2018

(Originated from dispute number CMA/GTA/83 & 84 OF 2017)

LEDGAR NYAGAWA & ISAYA BANGULAMBONA..... APPLICANTS

VERSUS

SPUTNIK ENGINEERING CO. LIMITED ..... RESPONDENT

JUDGMENT

Last order: 24.07.2020

Judgment Date: 30.07.2020

A.Z.MGEYEKWA, J

The applicants; Ledgar Nyagawa & Isaya Bangulambona is this Revisionwere aggrieved by the decision and award of the Commission for Mediation and Arbitration in CMA/GTA/83 & 84/2017 whereas, the respondent, Sputnik Engineering Co. Limited emerged a winner. The application is brought by way of Notice of Application and of Chamber Summons which is made under section 91(1)(a), 91(2)(c) and Section 94 (1)(b),(i) of the Employment and Labour Relations Act, No.6 0f 2004 as

amended by section 14 (b) of the Written Laws (Miscellaneous Amendments) Act, No. 03/2010 and Rule 24 (1),(2)(a)-(f) (3)(a)-(d) and Rule 28 (1) (a)-(e) of the Labour Court Rules, 2007. The application was supported by an affidavit deponed by Alhaji Majogoro, learned counsel for the applicants. The respondent challenged the application by filing a Notice of Opposition and a Counter-Affidavit deponent by Juma Majura, learned counsel.

At the hearing of this application, the applicants enjoyed the service of Mr. Alhaji Majogoro, learned counsel and the respondent enjoyed the service of Mr. Ringia, learned counsel.

The applicant in his chamber summons prayed for the following orders:-

a) That this Honourable Court is pleased to call for records of the Commission for Mediation and Arbitration and revise and set aside the Arbitration Award in respect of labor dispute number in CMA/GTA/83/84/2017 *by the Commission for Mediation and Arbitration for Geita.*

2. Any other relief as the Honourable Court may deem fit just to grant.

The case summarizes that the applicants were employed by the respondent, the first applicant was employed on the 9th day of May 2015

and the second applicant contract started to run from January 2017 to December 2017. The applicants complained that on 14th March 2017 they were paid their 2 months' salaries and Tshs. 70,000/=. On the following day around 11:00 hours, the site Manager informed them that he cannot work with them thus they were paid Tshs. 70,000/= as fare to Dar es Salaam. However, the employer did not issue any termination letter.

The applicants reported to the office at Dar es Salaam and on 23rd March 2017, they were given intention notice for employment termination for misconduct, foul language, and persuade other staff not to work. The applicant went back to Geita and at the end of March 2017, they were paid 15 days of the working days. Thereafter they realized that they were terminated because they had no ID with them. Then the applicants decided to file a claim before the CMA and claimed for outstanding salaries for 9 and ½ months, repatriation, and disturbance allowance.

Supporting the application, the learned counsel for the applicant raised 6 grounds of review, on the first ground, he argued that it was improper for the Arbitrator to require a termination letter in constructive termination. The learned counsel referred this court to Rule of GN 42 of 2007 and argued that constructive termination is when an employer

creates an intolerable environment for the employee and renders him quite. He went on to argue that in the instant case it was the employee who decided to quit the job hence it was not correct for the CMA to rule out that the applicants did not tender termination letter to prove the claims.

Submitting on the second ground, Mr. Majogolo faulted the arbitrator for stating that the site Manager had no mandate to terminate the applicants as it was the same site Manager who terminated the applicants hence if he had no mandate then the suspension was improper.

In respect to the third round, the learned counsel for the applicants referred this court to Rule 27(ii) of GN. 42 of 2007 and argued that when an employee is suspended they are required to be paid full salary contrary to that amount to constructive termination. Mr. Majogolo fortified his argumentation by referring this court to the cases of **Swiss Port Tanzania v Modestus Njau**, Labour Division, Moshi Revision No. 12 of 2015, and **Paulina Minza v Junior Construction Ltd**, Labour Revision No. 94 of 2019.

As to the fourth ground, Mr. Majogolo submitted that there is no contract to prove that the applicants were employed by another Company. He went on to submit that even if they were employed by another Company while on suspension, the same does not vitiate their rights over the previous employer, thus they have the right to demand their rights.

Concerning the fifth ground, the learned counsel for the applicants spiritedly argued that there is no testimony or discussion on the misconduct of the applicant while on duty. He insisted that there is nowhere at any time when the respondent issued any warning regarding misconduct and no internal mechanism which reveals that the applicants were found with the said misconduct. Mr. Majogolo argued that constructive termination vitiates the whole proceedings.

On the last ground, Mr. Majogolo argued that the record is silent that the employer conducted a disciplinary hearing and found the applicants guilty. He referred this court to Rule 13(6) of GN.42 of 2007 which requires an employer to proceed ex-parte against the employee who refused to attend the disciplinary hearing. He valiantly argued that the arbitrator faulted himself to reach the said decision.

In conclusion, the learned counsel for the applicants urged this court to allow the application, the applicants to be paid the outstanding of 10 months' salaries and repatriation as stated under paragraph 18 of the applicants' affidavit.

Mr. Ringia, learned counsel for the respondent, on the other hand, controverted the submission of the applicants' Advocate and argued that the employer started the procedure for conducting a disciplinary hearing but it was not completed. He went on to state that the applicants were served with the charge sheet, they replied and wanted the management to conduct an investigation. He went on to argue that it is true that the process was ongoing but the respondent did not terminate the applicants from their employment.

As to the fifth ground, Mr. Ringia argued that all employees and managers were notified by a letter that the employer will conduct an investigation, which was the lawful order, but the applicant on their return to Geita they were employed by another company.

On the fourth ground, he valiantly argued that there was no need to tender a contract because it was proved that the applicants were already working in another company.

In respect to the third ground, Mr. Ringia spiritedly argued that the applicants' claims were not related to constructive termination and there was no issue on this matter. He went on to argue that the issue is typically upon the applicants to prove their allegations and that is why the arbitrator asked them for termination letter. The learned counsel for the respondent continued to argue that parties framed issues for determination and the first issue was to the effect that the applicants were not terminated thus, the learned counsel for the applicants came up with constructive termination.

Mr. Ringia forcefully argued that in cases of suspension without pay, the first thing was not shown whether the employee left from the workplace. He added that the applicants did not tender termination or resignation letter and so it was not proved that they quit their jobs. The second condition is the reason for the termination of the contract. The

judge declined their application based on mistreatment and thus in the present case it was not an issue but it was not proved.

He distinguished the cited case of Paulina Minza and argued that it is not related to the present case because in the present case the employees were not suspended but were moved to Dar es Salaam by the site Manager and they were not told to stay home. He added that the site Manager had no mandate to suspend them and he did not do so but instead, he transferred them to Dar es Salaam.

Mr. Ringia referred this court to the case of **David Mzaligo v NMB** Civil Appeal No. 16 of 2016, which states the rights of an employee who worked less than 6 months even and argued that the leaves cannot be considered. He went on to state that the employee did not act upon actual or constructive termination, therefore the arbitrator was right to decline the applicant's claims because they were not terminated. He distinguished the cited case of **Swissport** (supra) and stated that the same does not apply in the circumstances of the case at hand.

In conclusion, Mr. Ringia urged this court to sustain the CMA decision and dismiss the application.

In his rejoinder, the learned counsel for the applicant stated that the applicants were not probation employees thus they are protected by the law. He insisted that the employees were not paid their salaries. He added that when an employee is suspended he is not terminated thus they were supposed to get what they work for from the workplace.

He maintained their final requests for the applicants to be paid 10 months of outstanding salaries.

I have gone through CMA records and this Court duly considered the submissions of both learned counsels with eyes of caution. The issue for determination is whether the award was improperly procured.

It is in the record that the Arbitrator's reasoning in the award, made a finding that there the applicants were not terminated from the employment and at the end result he dismissed the applicants' claims. In accordance to the CMA Form No.1 the applicants referred their disputes to the CMA claiming that the employer has constructively terminated the employee's contract. The issue for determination is ***whether the***

employer created intolerable employment conditions to the applicants.

It is the established principle that for constructive termination among others, it must be proved that the employment was intolerable. The principle for constructive termination was aptly dealt in the case of **Katavi Resort v Munirah J. Rashid**, High Court Labour Division at Dar es Salaam; Labour Revision No. 174 of 2018, whereby Hon. Misawa, J (as he then was) on page 18 of his judgment developed four principles to find constructive termination in a case as:-

1. The employer should have made the employment intolerable.
2. Termination should have been prompted or caused by the conduct of the employer.
3. The employee must establish there was no voluntary intention by the employee to resign. The employer must have caused the resignation.
4. The Arbitrator or court must look at the employer's conduct as a whole and determine whether its effects, judged reasonably and sensibly, is that the employee cannot be expected to put up with it.

Similarly, the related principle was articulated in the case of **Swissport (supra)**. Additionally, constructive termination is articulated under Rule 7 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 which state that:-

" 7 (1) Where an employer makes an employment intolerable which may result in the resignation of the employee that resignation amount to forced resignation or constructive termination.

(2) Subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination –

(a) sexual harassment or the failure to protect an employee from sexual harassment; and

(b) if an employee has been unfairly dealt with, provided that the employee has utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.

(3) where it is established that the employer made employment intolerable as a result of resignations of the employee, it shall

be legally regarded as the termination of employment by the employer.

To determine the issue of constructive termination the following questions are imperatives as stated in the case of **Girango Security Group v Rajabu Masudi Nzige** Labour Revision No. 164/2013 (unreported) that:-

i) *Did the employee intend to bring the employment relationship to an end?*

ii) *Had the working relationship become so unbearable objectively speaking that the employee could not fulfill his obligation to work?*

iii) *Did the employer create an intolerable situation?*

iv) *Was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?*

v) *Was the termination of the employment contract the only reasonable option open to the employee?*

Additionally, in the case of **Murray v Minister of Defence** (383/2006) [2008] ZASCA 44, South African Supreme Court added another essential criterion in constructive construction. The Court held that:-

" The onus rests on the employee to prove that the resignation was voluntary and that it was not intended to terminate the employment relationship".

In determining the revision before me, I will apply the above-mentioned principles as quoted in the above cases and proof of at least three criteria need to be established. In the instant appeal, it is apparent that the employer (respondent) did not terminate the applicants. However, the respondent's motive as illuminated by the applicants in their evidence is the one which made them move to another Company. They complained that the site Manager after informing the applicants that he does not want to work with them and they were instructed to report to Dar es Salaam offices. The site manager ordered them to surrender their ID cards immediately. Although the employer did not terminate the applicants somehow the employer caused the applicants to leave their employment and search for a new job because of the act of the employer of paying the applicants half salaries without any explanation prompt the applicants. Therefore, in my opinion, I consider that the working environment was intolerable.

The following criteria which this court is going to determine whether the site Manager's behavior of neglecting the employee made the working relationship so unbearable, that the employee could not fulfil their obligation to work or was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?

Basing on the applicants' oral evidence it is shown that the act of the site Manager to require the applicants to surrender their ID and paying them half salary without explanation made the applicants unable to fulfill their obligation to work because they were not able to work without having an ID and the act of the site Manager was uncouth. However, the site Manager gave the applicants visitors ID; permitting them to enter into the office that means he did not completely restrain them from going to the office.

Nevertheless, on the other hand, I fault the applicants, it is on record that the Human Resource went to Geita but they did not discuss their problems with him. In my considered opinion, if in any way the applicants were not satisfied by the decision of the site Manager they were required to utilize all available internal mechanisms to deal with their grievances as

stated under Rule 7 (2) (b) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. The applicants could have taken initiative to complain to the proper channel, the head of Human Resource even the superior authority; Director or General Manager of the Company. The records are silent if the applicants wrote any complaint letters to the authority.

The applicants were supposed to tender at the CMA cogent evidence to prove that the respondent put the applicants in an intolerable situation. Taking to account that they did not tender any resignation letter to show that the working environment was intolerable. In the case of **Stanely Habulani Fakude v Support and Others** (JR 1327/06) [2010] ZALC 189 a South African case is *part material* to our laws. The court held that to establish constructive dismissal there shall be the following three requirements; firstly, the employee must have terminated the contract of employment. Secondly, the reason for termination of the contract of employment must be that continued employment has become intolerable for the employee. Thirdly, it must have been the employee's employer who had made continued employment intolerable.

As I have mentioned above, it is undisputed that the respondent has established the 3rd requirement. However, the first requirement was not fulfilled, that the respondent must have terminated the contract of employment. There is no proof that the applicants' employment were terminated.

Based on the above observations, I am in accord with the learned counsel for the applicants that the site Manager made an intolerable working environment for the applicants for ordering them to surrender the working ID and for paying them half salary. However, I have noted that the applicants have contributed to their claims, DW1 testified that the applicants were ordered to surrender the company properties because they were employed by another company but they denied instead they filed a claim at the CMA.

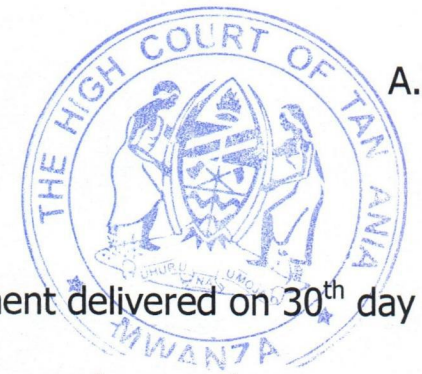
Additionally, as stated earlier, the applicants did not exhort the internal mechanisms to deal with their grievances instead they opted to search for new employment. They even did not resign from their employment.

In the circumstances, I am of the view that the applicants' claims are unfounded, they cannot benefits from the umbrella of constructive termination.

In the upshot, the Arbitrator's decision and award are uphold, I proceed to dismiss the application. Since this is a labour matter I make no order as to costs.

Order accordingly.

Dated at Mwanza this date 30th day of July 2020.



A.Z.MGEYEKWA

JUDGE

30.07.2020

Judgment delivered on 30th day of July, 2020 via audio teleconference, and both learned counsels were remotely present.

A.Z.MGEYEKWA

JUDGE

30.07.2020

Right to Appeal explained.